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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BARBARA ANN CRANCER,
Petitioner,

vs.

U.S. DEPARTMENT OF JUSTICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals misread this Court's rulings in holding that a District Court is without authority as a matter of law to require the preparation of a *Vaughn* index to support the withholding of documents pursuant to Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, the Honorable Barbara Ann Crancer, Associate Circuit Judge for the Twenty-First Judicial Circuit of the State of Missouri ("Petitioner"), respectfully prays that a writ of certiorari issue to review the *en banc* opinion and judgment of the United States Court of Appeals for the Eighth Circuit which was entered on August 5, 1993.

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Eighth Circuit is reported as *In re Department of Justice*, 999 F.2d 1302 (8th Cir. 1993). App. A. The panel decision of the Eighth Circuit is reported as *In re Department of Justice*, 950 F.2d 530 (8th Cir. 1991). App. B. The District Court Orders requiring the preparation of an index pursuant to *Vaughn v.*

Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), dated July 27, 1990, August 16, 1990, January 18, 1991, March 22, 1991, April 11, 1991, and April 18, 1991, are unreported. Apps. C-H.

JURISDICTION

The *en banc* opinion of the United States Court of Appeals for the Eighth Circuit was entered on August 5, 1993, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 552(b)(7)(A) provides in pertinent part as follows:

> (b) This section does not apply to matters that are —
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, ...

The last sentence of 5 U.S.C. § 552(b) provides:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

STATEMENT OF THE CASE

For more than five years, Petitioner, daughter of James ("Jimmy") R. Hoffa, has attempted to obtain information pursuant to the Freedom of Information Act ("FOIA") regarding the disappearance of her father 16 years ago. The Federal Bureau of Investigation ("FBI") has admitted that it has at least 69 volumes of records and almost 14,000 pages of documents. Only 290 pages of public source documents have been produced, and the

vast remainder have been withheld under the FOIA, pursuant to Exemption 7(A), 5 U.S.C. § 552(b)(7)(A).

To support its claim of exemption, the FBI provided the District Court with "categorical" descriptions of the withheld documents that changed with each of the three, cursory showings proffered to the District Court.[2] The last categorization pur-

[2] Notwithstanding the filing of sworn statements, the FBI categories have expanded and contracted without explanation with each filing. In first moving for summary judgment, the Government filed the Declaration of Angus B. Llewellyn who identified the responsive documents in the file as follows:

> The file contains the results of extensive investigation into Hoffa's disappearance, including documents which contain the results of interviews with numerous individuals, information provided by confidential sources, reports on the location and viability of potential evidence, background information on suspects, and materials which detail the procedures followed by the FBI in conducting the investigation.

Declaration of Angus B. Llewellyn at ¶ 6.

In the Second Declaration of Angus B. Llewellyn, Mr. Llewellyn states that the documents in the file are "categorized" as follows:

1. Documents setting forth leads to be conducted;

2. Documents containing information received from confidential informants;

3. Information and documents provided by local law enforcement;

4. Interviews of third parties and cooperating witnesses;

5. Public source information such as newspaper clippings and press releases;

6. Laboratory reports setting forth results of examination; and

7. Polygraph worksheets and reports.

Second Llewellyn Declaration at ¶ 12.

Finally, the Government submitted its "index" of withheld documents. App. I. On its face, it reveals categories of documents that are not exempt from disclosure or that were previously unidentified. These include the following:

(Footnote 2 continued on next page)

ported to describe the 14,000 pages of documents in just five pages. App. I. Conspicuously absent from the "showings" were representations that: (1) all documents had been properly described by the proffered five-page index; (2) any official had reviewed or inspected the withheld documents in creating the index; (3) none of the withheld documents had been publicly released;[3] and (4) all information that was segregable and not subject to the exemption was released.

Dissatisfied with the cursory and conclusionary showing of the FBI for its claim of blanket exemption, the District Court properly ordered, on four separate occasions, that the U. S. Department of Justice ("DOJ") file an index pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974)("a *Vaughn* index"), to describe the withheld documents. Apps. C-H.

(Footnote 2 continued)

Category D: FBI field office reports on financial expenditures and manpower allocations. The basis for withholding these documents, the majority of which are up to seventeen-years-old, is unintelligible, and the documents were not previously disclosed in the FBI Declarations.

Category E: High level conferences and status reports on the investigation. Although such reports may have been sensitive at the time made, reports that are now seventeen-years-old regarding strategy decisions should be releasable with redactions for confidential source materials; and

Category I: Memoranda updating the Director on FBI investigative efforts. Again, many of these documents may be as old as seventeen years. Although the documents may contain confidential source information of secret investigative techniques, such information can certainly be redacted allowing release of the information that is not subject to a FOIA exemption.

[3] Of particular importance, Petitioner demonstrated that the FBI had publicly released certain witness interviews and other documents which the FBI has withheld from the Petitioner. Witness interviews that have been released by the FBI but not provided to Petitioner are attached as App. J.

The DOJ then filed a Petition for Writ of Mandamus and a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit on May 14, 1991, and May 22, 1991, respectively. Following the issuance of a stay of the District Court's Orders pending appellate review, and consolidation of the appeals, a panel of the Eighth Circuit affirmed the District Court's Orders. The panel recognized that the FBI had failed to provide adequate information regarding the nature of the withheld documents:

> The district court's dissatisfaction is understandable given the government's blanket assertion that all 13,800 documents, accumulated over a 15-year span, fit neatly into nine categories described over the course of five pages. Furthermore, Crancer raised arguments that, in the district court's belief, raised serious questions about the validity of the government's search and categorization.

In re Department of Justice, 950 F.2d at 535; App. B. The "serious questions" stem from the repeated failure of the DOJ to state that all documents were, in fact, included in the proffered categorization and that any official even examined the file and reviewed the documents in creating the five-page categorization.

The panel decision was then reversed by the court sitting *en banc*. *In re Department of Justice*, 999 F.2d at 1302; App. A. The court held that the Order for a *Vaughn* index "exceeds the bounds of the statute as interpreted by the Supreme Court and tnis court." *Id.* at 1309. Accordingly, the Court of Appeals *en banc* reversed the District Court Orders and held that a District Court exceeded its authority by requiring the filing of the traditional *Vaughn* index by the DOJ to justify the withholding of documents under Exemption 7(A).

REASON FOR GRANTING THE WRIT

THE *EN BANC* RULING CONTRAVENES THIS COURT'S HOLDINGS AND IMPROPERLY CREATES A BLANKET EXEMPTION FOR INVESTIGATIVE RECORDS.

The Freedom of Information Act, 5 U.S.C. § 552, enables citizens regardless of status to gain access to Government documents, thus "'open[ing] agency action to the light of public scrutiny'." *Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 772 (1989), *quoting Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976); *see also John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989)("[FOIA] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands"). The FOIA's purpose "is 'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed'." *John Doe Agency*, 493 U.S. at 152, *quoting NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). It requires "full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of the Air Force v. Rose*, 425 U.S. 360 (1976). The exemptions "must be narrowly construed." *Id.* at 361; *see also Department of Justice v. Landano*, ___ U.S. ___, 113 S.Ct. 2014, 2024 (May 24, 1993)("[O]ur obligation [is] to construe FOIA exemptions narrowly in favor of disclosure. . . .").

This Court has repeatedly enforced the mandate of 5 U.S.C. § 552(a)(4)(B) that it is the burden of the Government to show that documents are properly withheld. *Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 755 (1989); *Department of Justice v. Tax Analysts*, 492 U.S. 136, 151

(1989). For Exemption 7(A), only records or information compiled for law enforcement purposes are exempt, and "the Government has the burden of proving the existence of such a compilation for such a purpose." *John Doe Agency v. John Doe Corp.*, 493 U.S. 153 (1989).[4]

In 1974, Congress amended Exemption 7(A) to, among other reasons, preclude the ability of "agencies . . . to commingle otherwise non-exempt materials with exempt materials in a law enforcement investigative file and claim protection from disclosure for the contents." *John Doe Agency*, 493 U.S. at 156; Pub L. 89-487, Section 3(e)(7), 80 Stat. 251. To prevent "evasive commingling," Exemption 7(A) requires "consideration of each particular document as to which exemption was claimed." *John Doe Agency*, 493 U.S. at 157, *citing Robbins Tire*, 437 U.S. at 221-22.

The Court of Appeals' *en banc* ruling eviscerates this requirement. Here, the District Court found that the cursory and inconsistent showing of the Government utterly failed to be sufficient to meet the Government's burden of proof under Exemption 7(A). At no time did the DOJ show that (1) all withheld documents had been reviewed, (2) all withheld documents fit within the claimed categories, (3) all withheld documents had, in fact, never been publicly released, and (4) all

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[4] Under Exemption 7(A), the Government must show not only that the records "were compiled for law enforcement purposes," but also that the disclosure of the records can "reasonably be expected to interfere with law enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Neither the District Court nor the Court of Appeals has addressed the latter issue. This issue has been reached in a separate action seeking release of the same documents, *Brian Dickerson v. Department of Justice*, 992 F.2d 1246 (6th Cir. 1993), for which a petition for certiorari has been filed and is pending. In *Dickerson*, the Sixth Circuit affirmed a finding of potential interference by reviewing, *in camera*, a self-serving sample of documents without the benefit of the adversary process.

withheld documents contained no segregable information.[5] For this reason, the District Court required a *Vaughn* index to ensure that there would be a specific document-by-document review to ensure that the Government met its burden under the FOIA:

> The significance of agency affidavits in a FOIA case cannot be underestimated. As, ordinarily, the agency alone possesses knowledge of the precise content of documents withheld, the FOIA requester and the court both must rely upon its representations for an understanding of the material sought to be protected.
>
> * * *
>
> Affidavits submitted by a governmental agency in justification for its exemption claims must therefore strive to correct, however, imperfectly, the asymmetrical distribution of knowledge that characterizes FOIA litigation. The detailed public index which in *Vaughn* we required of withholding agencies is intended to do just that: "to permit adequate adversary testing of the agency's claimed right to an exemption," and enable "the District Court to make a rationale decision whether the withheld material must be produced without actually viewing the documents them-

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[5] Administrative agencies "shall" provide "[a]ny reasonably segregable portion of a record . . . after the deletion of the portions which are exempt." 5 U.S.C. § 552(b). The segregability requirement "applies to all documents and all exemptions in the FOIA." *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992). The failure to make a finding on segregability warrants reversal. *See Mapother v. Department of Justice*, ___ F.3d ___ (D.C. Cir. 1993)(available at 1993 W.L. 356083); *Powell v. United States Bureau of Prisons*, 927 F.2d 1239, 1242 n.4 (D.C. Cir. 1991).

The District Court requirement that each document be reviewed ensures that segregability is considered and satisfied; the *en banc* opinion ignores the segregability requirement and allows the DOJ to ignore it in satisfying its burden under Exemption 7(A).

> selves, as well as to produce a record that will render the District Court's decision capable of meaningful review on appeal." Thus, when an agency seeks to withhold information, it must provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." Specificity is the defining requirement of the *Vaughn* index and affidavit; affidavits cannot support summary judgment if they are "conclusory, merely reciting statutory standards, or if they are too vague or sweeping." To accept an inadequately supported exemption claim "would constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review.

King v. Department of Justice, 830 F.2d 210, 218-19 (D.C. Cir. 1987). "[T]he purpose of the index is not merely to inform the requester of the agency's conclusion that a particular document is exempt from disclosure under one or more of the statutory exemptions, but to afford the requester an opportunity to intelligently advocate release of the withheld documents and to afford the court an opportunity to intelligently judge the content." *Weiner v. FBI*, 943 F.2d 972 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 3013 (1992).

The holding of the Court of Appeals is unprecedented. This Court has never held that a District Court is without power to order a *Vaughn* index when faced with inadequate showings by the Government to justify withholding. Nothing in the plain language of the statute supports or implies that a *Vaughn* index cannot be required to ensure compliance by the Government with its duty under the FOIA.

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978), does not support the *en banc* opinion. In *Robbins Tire*, this Court held that particularized showings of harm stemming from the

premature disclosure of witness statements were not required under the FOIA. 437 U.S. at 236. The decision addresses categorical showings for similar documents to demonstrate the likelihood of interference with enforcement proceedings; not whether a court must accept a five-page categorical index as an adequate description for 14,000 pages of documents. Nothing in the statutory language of the FOIA or the decisions interpreting that language provide that the District Court has been divested of authority to require a *Vaughn* index in an Exemption 7(A) case where the FBI has repeatedly failed to make the requisite showing that the withheld documents have been properly categorized.

To be sure, categorical showings under *Robbins Tire* are permissible to demonstrate the likelihood of harm. But such showings cannot be sufficient if the Government has not first shown that the responsive documents at issue fit within the identified categories. *See, e.g., Vaughn v. United States*, 936 F.2d 862, 868 (6th Cir. 1991). The requirement of a *Vaughn* index ensures the "individual scrutiny" by the Government that would otherwise result in "categories that would be no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendment of FOIA." *Bevis v. Department of Justice*, 801 F.2d 1386, 1389 (D.C. Cir. 1986), *quoting Robbins Tire*, 437 U.S. at 236.

If left undisturbed, the *en banc* opinion serves to guarantee the withholding of any documents claimed to be exempt under Exemption 7(A). The categorization set forth in the five-page index describes documents in such broad terms that the index could, and will, in all likelihood, be used for every investigative file maintained by the FBI. If this inadequate showing is left unchallenged, the FBI will have, *defacto*, a blanket exemption for all investigative files even though Congress specifically amended the FOIA in 1974 to ensure that this would not be the case. *See FBI v. Abramson*, 456 U.S. 615, 621-22 (1982).

This danger is real. The holding of the Court of Appeals bars a District Court from requiring the individual review of the documents in an investigative file that is required if Exemption 7(A) is not to become the blanket exemption Congress intended to preclude through the 1974 Amendment to the FOIA. Absent the use of a *Vaughn* index, there is simply no mechanism to ensure that the Government satisfies its burden in properly categorizing the documents, or even reviews the documents in the first instance before claiming a blanket exemption under Exemption7(A). The effect of the court's holding is to gut the requirement that, although the FBI "need not justify its withholding on a document-by-document basis in court, the FBI must itself review each document to determine the category in which it properly belongs." *Bevis v. Department of Justice*, 801 F.2d 1386, 1389 (D.C. Cir. 1986).

Suspicion of Government has recently increased as files remain closed for decades and film-makers produce inflammatory films, such as "JFK." The FOIA was intended to increase trust in Government by providing for disclosure of documents to produce greater understanding of governmental conduct. The history of resistance shown here to a devoted and loving daughter's legitimate request for information regarding the disappearance of her father over eighteen years ago only increases skepticism as to what the FBI did or did not do in investigating the crime, or what the FBI knew or did not know as to how the crime was committed. Petitioner is not asking this Court to order the release of any documents today; only that the FBI and DOJ be required to conform to the dictates of the FOIA and the four District Court Orders to permit further litigation on an informed basis as to whether the withheld documents should be released.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision below.

Respectfully submitted,

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